

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**May 03, 2022**

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

HENRY O.,<sup>1</sup>

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>2</sup>

Defendant.

No. 4:20-cv-05141-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 18, 19

<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

<sup>2</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF  
2 Nos. 18, 19. The Court, having reviewed the administrative record and the parties'  
3 briefing, is fully informed. For the reasons discussed below, the Court denies  
4 Plaintiff's motion, ECF No. 18, and grants Defendant's motion, ECF No. 19.

### 5 JURISDICTION

6 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
7 1383(c)(3).

### 8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social  
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
11 limited; the Commissioner's decision will be disturbed "only if it is not supported  
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
15 (quotation and citation omitted). Stated differently, substantial evidence equates to  
16 "more than a mere scintilla[, ] but less than a preponderance." *Id.* (quotation and  
17 citation omitted). In determining whether the standard has been satisfied, a  
18 reviewing court must consider the entire record as a whole rather than searching  
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
6 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§  
7 404.1502(a), 416.902(a). Further, a district court “may not reverse an ALJ’s  
8 decision on account of an error that is harmless.” *Id.* An error is harmless “where  
9 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at  
10 1115 (quotation and citation omitted). The party appealing the ALJ’s decision  
11 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,  
12 556 U.S. 396, 409-10 (2009).

### 13 FIVE-STEP EVALUATION PROCESS

14 A claimant must satisfy two conditions to be considered “disabled” within  
15 the meaning of the Social Security Act. First, the claimant must be “unable to  
16 engage in any substantial gainful activity by reason of any medically determinable  
17 physical or mental impairment which can be expected to result in death or which  
18 has lasted or can be expected to last for a continuous period of not less than twelve  
19 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
20 impairment must be “of such severity that he is not only unable to do his previous

1 work[,] but cannot, considering his age, education, and work experience, engage in  
2 any other kind of substantial gainful work which exists in the national economy.”  
3 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

4 The Commissioner has established a five-step sequential analysis to  
5 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
6 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
7 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
8 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
10 404.1520(b), 416.920(b).

11 If the claimant is not engaged in substantial gainful activity, the analysis  
12 proceeds to step two. At this step, the Commissioner considers the severity of the  
13 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
14 claimant suffers from “any impairment or combination of impairments which  
15 significantly limits [his or her] physical or mental ability to do basic work  
16 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
17 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
18 however, the Commissioner must find that the claimant is not disabled. *Id.*

19 At step three, the Commissioner compares the claimant’s impairment to  
20 severe impairments recognized by the Commissioner to be so severe as to preclude

1 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
2 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
3 severe than one of the enumerated impairments, the Commissioner must find the  
4 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

5 If the severity of the claimant's impairment does not meet or exceed the  
6 severity of the enumerated impairments, the Commissioner must pause to assess  
7 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
8 defined generally as the claimant's ability to perform physical and mental work  
9 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
10 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
11 analysis.

12 At step four, the Commissioner considers whether, in view of the claimant's  
13 RFC, the claimant is capable of performing work that he or she has performed in  
14 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
15 If the claimant is capable of performing past relevant work, the Commissioner  
16 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
17 If the claimant is incapable of performing such work, the analysis proceeds to step  
18 five.

19 At step five, the Commissioner considers whether, in view of the claimant's  
20 RFC, the claimant is capable of performing other work in the national economy.

20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other work, the analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that 1) the claimant is capable of performing other work; and 2) such work "exists in significant numbers in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### ALJ'S FINDINGS

On October 9, 2018, Plaintiff applied both for Title II disability insurance benefits and Title XVI supplemental security income benefits alleging an amended closed period of disability, May 28, 2014 through March 20, 2019. Tr. 16, 100-01, 213-25. The applications were denied initially and on reconsideration. Tr. 132-35, 140-45. Plaintiff appeared before an administrative law judge (ALJ) on November

1 15, 2019. Tr. 38-75. On January 22, 2020, the ALJ issued a partially favorable  
2 decision, finding Plaintiff was disabled from May 28, 2014 through January 1,  
3 2016 but had medical improvement as of January 2, 2016 and thus his disability  
4 ended that date. Tr. 12-37.

5 At step one of the sequential evaluation process, the ALJ found Plaintiff,  
6 who met the insured status requirements through December 31, 2019, has not  
7 engaged in substantial gainful activity since May 28, 2014. Tr. 20. At step two,  
8 the ALJ found that from May 28, 2014 through January 1, 2016, Plaintiff had the  
9 following severe impairments: left scapula fracture, left humerus fracture, and  
10 obesity. *Id.*

11 At step three, the ALJ found Plaintiff's impairments medically equaled the  
12 severity of Listing 1.08 from May 28, 2014 through January 1, 2016. Tr. 21. The  
13 ALJ found Plaintiff had medical improvement beginning January 2, 2016, and  
14 Plaintiff's impairments no longer met or equaled a listing since January 2, 2016.  
15 Tr. 23-24. The ALJ then concluded that since January 2, 2016, Plaintiff has had  
16 the RFC to perform light work with the following limitations:

17 [Plaintiff] can lift/carry 10 pounds frequently and 20 pounds  
18 occasionally, primarily with the dominant right upper extremity. He  
19 can never push or pull with his non-dominant left upper extremity,  
20 never climb ladders, ropes, or scaffolds, and never crawl. He can  
frequently stoop, kneel, crouch, and climb stairs. He can less than  
occasionally reach in all directions with the non-dominant left upper  
extremity. He can less than occasionally handle, finger, and feel  
objects with the non-dominant left hand. [Plaintiff] must avoid all

1 exposure to extreme temperatures; excessive vibrations; and  
2 unprotected heights. [Plaintiff] can perform simple, routine tasks  
3 consistent with a reasoning level of 3 or less due [to] physical  
4 impairments and the effects of medications.

5 Tr. 24.

6 At step four, the ALJ found Plaintiff is unable to perform any of his past  
7 relevant work. Tr. 28. At step five, the ALJ found that, considering Plaintiff's  
8 age, education, work experience, RFC, and testimony from the vocational expert,  
9 there were jobs that existed in significant numbers in the national economy that  
10 Plaintiff could perform, such as office helper, courier, and charge account clerk.  
11 Tr. 29. Therefore, the ALJ concluded Plaintiff was disabled from May 28, 2014  
12 through January 1, 2016, but was not under a disability, as defined in the Social  
13 Security Act, from January 2, 2016 to the date of the decision. *Id.*

14 On July 1, 2020, the Appeals Council denied review of the ALJ's decision,  
15 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes  
16 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

### 17 ISSUES

18 Plaintiff seeks judicial review of the Commissioner's final decision denying  
19 him disability insurance benefits under Title II and supplemental security income  
20 benefits under Title XVI of the Social Security Act. Plaintiff raises the following  
issues for review:



- 1 1. Whether the ALJ conducted a proper step-two analysis;
- 2 2. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 3 3. Whether the ALJ properly evaluated the medical opinion evidence; and
- 4 4. Whether the ALJ conducted a proper step-five analysis.

5 ECF No. 18 at 4.

## 6 **DISCUSSION**

### 7 **A. Step Two**

8 Plaintiff argues the ALJ erred in failing to find his mental impairments are  
9 severe impairments. ECF No. 18 at 6-10.

10 At step two of the sequential process, the ALJ must determine whether the  
11 claimant suffers from a "severe" impairment, i.e., one that significantly limits  
12 his/her physical or mental ability to do basic work activities. 20 C.F.R. §§  
13 404.1520(c), 416.920(c). When a claimant alleges a severe mental impairment, the  
14 ALJ must follow a two-step "special technique" at steps two and three. 20 C.F.R.  
15 §§ 404.1520a, 416.920a. First, the ALJ must evaluate the claimant's "pertinent  
16 symptoms, signs, and laboratory findings to determine whether [he or she has] a  
17 medically determinable impairment." 20 C.F.R. §§ 404.1520a(b)(1),  
18 416.920a(b)(1). Second, the ALJ must assess and rate the "degree of functional  
19 limitation resulting from [the claimant's] impairments" in four broad areas of  
20 functioning: understand, remember, or apply information; interact with others;

1 concentrate, persist, or maintain pace; and adapt or manage oneself. 20 C.F.R. §§  
2 404.1520a(b)(2)-(c)(4), 416.920a(b)(2)-(c)(4). Functional limitation is measured  
3 as “none, mild, moderate, marked, and extreme.” 20 C.F.R. §§ 404.1520a(c)(4),  
4 416.920a(c)(4). If limitation is found to be “none” or “mild,” the impairment is  
5 generally considered to not be severe. 20 C.F.R. §§ 404.1520a(d)(1),  
6 416.920a(d)(1). If the impairment is severe, the ALJ proceeds to determine  
7 whether the impairment meets or is equivalent in severity to a listed mental  
8 disorder. 20 C.F.R. §§ 404.1520a(d)(2)-(3), 416.920a(d)(2)-(3).

9       The ALJ found Plaintiff has been diagnosed with PTSD, depressive  
10 disorder, and anxiety disorder, but the evidence does not support a finding that the  
11 impairments has had more than a minimal effect on Plaintiff’s ability to perform  
12 work-related activities. Tr. 20. The ALJ noted the treatment records document  
13 only mild mental health symptom complaints without evidence of significant  
14 functional deficits caused by the symptoms. *Id.* The ALJ found Plaintiff had only  
15 mild limitations in all four areas of functioning. Tr. 21. The ALJ noted Plaintiff  
16 reported improvement in his symptoms with medication and an anger management  
17 class, and he later stopped mental health treatment for a two-year period. Tr. 27.

18       Plaintiff argues the ALJ erred because he did not rely on any provider  
19 opinions nor cite to any specific records in making his non-severe finding. ECF  
20 No. 18 at 7-8 (citing Tr. 21). However, Plaintiff does not cite to any authority to

1 support the argument that an ALJ is required to rely on a medical opinion to  
2 support a non-severe finding. While Plaintiff argues the ALJ did not cite to any  
3 specific records to support the finding, the ALJ further discussed Plaintiff's mental  
4 impairments later in the decision, which includes citations to the record. Tr. 27.  
5 Plaintiff cites to medical providers who opined he had limitations due to his mental  
6 impairments, but as discussed further *infra*, Plaintiff does not challenge any of the  
7 reasons the ALJ offered to reject the opinions. ECF No. 18 at 8-9. Plaintiff does  
8 not cite to any other evidence in his opening brief to support the argument that his  
9 mental impairments cause more than mild limitations. Plaintiff also does not offer  
10 an explanation for his lack of mental health treatment for a two-year period.  
11 Plaintiff has not met his burden in demonstrating the ALJ harmfully erred at step  
12 two. Plaintiff is not entitled to remand on these grounds.

### 13 **B. Plaintiff's Symptom Claims**

14 Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
15 convincing in discrediting his symptom claims. ECF No. 18 at 10-14. An ALJ  
16 engages in a two-step analysis to determine whether to discount a claimant's  
17 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
18 "First, the ALJ must determine whether there is objective medical evidence of an  
19 underlying impairment which could reasonably be expected to produce the pain or  
20 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).

1 “The claimant is not required to show that [the claimant’s] impairment could  
2 reasonably be expected to cause the severity of the symptom [the claimant] has  
3 alleged; [the claimant] need only show that it could reasonably have caused some  
4 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

5 Second, “[i]f the claimant meets the first test and there is no evidence of  
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
9 omitted). General findings are insufficient; rather, the ALJ must identify what  
10 symptom claims are being discounted and what evidence undermines these claims.  
11 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*  
12 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently  
13 explain why he or she discounted claimant’s symptom claims)). “The clear and  
14 convincing [evidence] standard is the most demanding required in Social Security  
15 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*  
16 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 Factors to be considered in evaluating the intensity, persistence, and limiting  
18 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
19 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
20 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and

1 side effects of any medication an individual takes or has taken to alleviate pain or  
2 other symptoms; 5) treatment, other than medication, an individual receives or has  
3 received for relief of pain or other symptoms; 6) any measures other than treatment  
4 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
5 factors concerning an individual's functional limitations and restrictions due to  
6 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §§  
7 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in  
8 an individual's record," to "determine how symptoms limit ability to perform  
9 work-related activities." SSR 16-3p, 2016 WL 1119029, at \*2.

10 The ALJ found that Plaintiff's medically determinable impairments could  
11 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's  
12 statements concerning the intensity, persistence, and limiting effects of his  
13 symptoms were not entirely consistent with the evidence. Tr. 24-25. Plaintiff  
14 argues the ALJ erred in failing to give Plaintiff's testimony greater weight but does  
15 not address with any specificity the reasons the ALJ set forth to reject Plaintiff's  
16 claims. ECF No. 18 at 10-14. Thus, any challenge to those findings is waived.  
17 *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.  
18 2008) (determining Court may decline to address on the merits issues not argued  
19 with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may  
20

1 not consider on appeal issues not “specifically and distinctly argued” in the party’s  
2 opening brief).

3 Further, Plaintiff does not set forth an argument as to how the ALJ’s  
4 rejection of his symptom claims would be a harmful error. Plaintiff contends the  
5 ALJ should have credited his statements concerning his left arm limitations. ECF  
6 No. 18 at 12-13. Even if the ALJ limited Plaintiff to no use of his left arm,  
7 Plaintiff does not cite to any evidence that supports a finding that the inability to  
8 use an arm is in itself a disabling limitation. Courts have consistently held that  
9 claimants are capable of sustaining substantial gainful activity even without the use  
10 of an arm. *See, e.g., Knott v. Califano*, 559 F.2d 279 (5th Cir. 1977); *May v.*  
11 *Gardner*, 362 F.2d 616 (6th Cir. 1966). Plaintiff offers his own interpretation of  
12 the vocational evidence in arguing that he would be unable to perform the  
13 representative jobs due to his left arm limitations, ECF No. 18 at 13-14, but  
14 Plaintiff does not cite to any evidence or case law to support his interpretation.  
15 Despite the waiver of the issue and failure to show harmful error, the Court  
16 conducted an independent review of the ALJ’s decision and finds the ALJ’s  
17 opinion is supported by substantial evidence in the record.

18 *1. Inconsistent Objective Medical Evidence*

19 The ALJ found Plaintiff’s symptom claims were inconsistent with the  
20 objective medical evidence. Tr. 25-27. An ALJ may not discredit a claimant’s

1 symptom testimony and deny benefits solely because the degree of the symptoms  
2 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
3 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
4 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400  
5 F.3d 676, 680 (9th Cir. 2005). However, the objective medical evidence is a  
6 relevant factor, along with the medical source's information about the claimant's  
7 pain or other symptoms, in determining the severity of a claimant's symptoms and  
8 their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),  
9 416.929(c)(2).

10 First, the ALJ found Plaintiff's physical symptom complaints were  
11 inconsistent with the medical evidence. Tr. 25-26. While Plaintiff alleged ongoing  
12 disability through the entire closed period, the testifying medical expert, Dr.  
13 Lorber, opined Plaintiff had improvement after January 1, 2016. Tr. 25, 48-50.  
14 After an October 2015 surgery, Plaintiff reported "excellent benefit," and Dr.  
15 Lorber opined Plaintiff recovered from the surgery to the point of non-disability by  
16 January 2, 2016. Tr. 25-26, 48-50, 1442-43, 1451-53. Plaintiff reported some  
17 improvement with physical therapy, and he reported excellent benefit from joint  
18 manipulation. Tr. 25-26 (citing, e.g., Tr. 1230, 1442-44). At a January 2016  
19 examination, Plaintiff reported a low pain level, he had 3+ to 4 out of 5 motor  
20 strength in his left upper extremity with reduced grip strength, and he was able to

1 use both hands for tasks and reaching. Tr. 26 (citing Tr. 1466-69). The examiner  
2 opined Plaintiff was able to work full-time. Tr. 26, 1475. While Plaintiff reported  
3 some ongoing limitations in February 2016, he met or partially met many of his  
4 physical therapy goals and he was discharged from physical therapy. Tr. 26 (citing  
5 Tr. 723-24). In April 2016, Plaintiff reported managing his pain with only over-  
6 the-counter medications and gabapentin and he was able to perform many  
7 movements with his left hand. Tr. 1520. Plaintiff continued to demonstrate  
8 improvement in his symptom in June 2016 onward, such as demonstrating the  
9 ability to make a fist. Tr. 26 (citing Tr. 1551, 1565).

10 Second, the ALJ found Plaintiff's mental health symptom allegations were  
11 inconsistent with the objective evidence. Tr. 27. As discussed *supra*, the medical  
12 records document many normal findings and mild complaints of symptoms, and  
13 Plaintiff reported improvement with treatment. *Id.* (citing Tr. 1359, 1376, 1384,  
14 1411). Plaintiff also had a two-year gap in treatment from 2016 to 2018. Tr. 27  
15 (citing Tr. 1565). Plaintiff argues the records demonstrate abnormalities including  
16 nightmares, anxious mood, blunted affect, impaired short-term memory and  
17 concentration, and distracted thoughts. ECF No. 18 at 8 (citing Tr. 712, 1053,  
18 1059); ECF No. 20 at 2-3 (citing Tr. 1060, 1063, 1963). Despite some  
19 abnormalities, Plaintiff reported improvement in his symptoms with medication  
20 and anger management. Tr. 1059, 1177, 1213, 1245. At multiple examinations,



1 Plaintiff had largely normal mental status findings and reported no more than mild  
2 symptoms at multiple appointments. Tr. 1060, 1063, 1541, 1544-45, 1939, 1963.  
3 Further, most of the mental health evidence relates to the period during which the  
4 ALJ found Plaintiff was disabled, and even during the period shortly after his  
5 injury, Plaintiff had normal thought processes, behavior, appearance, orientation,  
6 abstract thinking, and judgment, although he had some abnormalities, including  
7 anxious mood, blunted affect, and impaired short-term memory. Tr. 1063.  
8 Plaintiff then had no mental health treatment for almost two years from 2016 to  
9 2018. In October 2018, Plaintiff had normal appearance, intact judgment and  
10 insight, normal orientation, fund of knowledge, and memory, although he had  
11 somewhat rapid speech and circumstantial responses. Tr. 1962-63. In July 2019,  
12 Plaintiff had a constricted affect and depressed mood, but normal thoughts,  
13 orientation, intelligence, social judgment, and insight. Tr. 1983.

14 On this record, the ALJ reasonably concluded that Plaintiff's symptom  
15 claims were inconsistent with the objective medical evidence. This was a clear and  
16 convincing reason, along with the other reason offered, to reject Plaintiff's symptom  
17 complaints.

## 18 *2. Activities of Daily Living*

19 The ALJ found Plaintiff's activities of daily living were inconsistent with his  
20 symptom claims. Tr. 27. The ALJ may consider a claimant's activities that

1 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a  
2 substantial part of the day engaged in pursuits involving the performance of  
3 exertional or non-exertional functions, the ALJ may find these activities  
4 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,  
5 674 F.3d at 1113. “While a claimant need not vegetate in a dark room in order to  
6 be eligible for benefits, the ALJ may discount a claimant’s symptom claims when  
7 the claimant reports participation in everyday activities indicating capacities that  
8 are transferable to a work setting” or when activities “contradict claims of a totally  
9 debilitating impairment.” *Molina*, 674 F.3d at 1112-13.

10       While Plaintiff argues his left arm is essentially nonfunctional and he should  
11 be considered “one-armed” for the entire closed period, ECF No. 18 at 15, Plaintiff  
12 reported being able to use his left hand to hold vegetables to help cut the  
13 vegetables, and he reported being able to pick up light grocery bags, lifting his son  
14 from the ground and playing with him, swimming, and carrying a 25-pound  
15 laundry basket. Tr. 25-26 (citing Tr. 727, 729-30, 1232, 1371, 1374). Plaintiff  
16 reported being generally independent with his activities of daily living; he can  
17 drive, bathe, dress, help care for two children including taking them to the park and  
18 providing transportation for them, and assists his fiancé with her clothing store,  
19 although he reports some challenges with activities such as difficulty with heavy  
20 grocery bags. Tr. 1960-61. Plaintiff was able to complete an associate degree by

1 September 2018. Tr. 27 (citing Tr. 1565). Plaintiff returned to working at a  
2 substantial gainful activity level in March 2019. Tr. 27.

3 On this record, the ALJ reasonably concluded that Plaintiff's activities of  
4 daily living were inconsistent with his symptom claims. This finding is supported  
5 by substantial evidence and was a clear and convincing reason to discount  
6 Plaintiff's symptom complaints. Plaintiff is not entitled to remand on these  
7 grounds.

### 8 **C. Medical Opinion Evidence**

9 Plaintiff contends the ALJ erred in his consideration of the opinions of  
10 Plaintiff's "medical and mental health providers." ECF No. 18 at 14-16.

11 As an initial matter, for claims filed on or after March 27, 2017, new  
12 regulations apply that change the framework for how an ALJ must evaluate  
13 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*  
14 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20  
15 C.F.R. §§ 404.1520c, 416.920c. The new regulations provide that the ALJ will no  
16 longer "give any specific evidentiary weight...to any medical  
17 opinion(s)..." *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-  
18 68; *see* 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, an ALJ must consider  
19 and evaluate the persuasiveness of all medical opinions or prior administrative  
20 medical findings from medical sources. 20 C.F.R. §§ 404.1520c(a)-(b),

1 416.920c(a)-(b). The factors for evaluating the persuasiveness of medical opinions  
2 and prior administrative medical findings include supportability, consistency,  
3 relationship with the claimant (including length of the treatment, frequency of  
4 examinations, purpose of the treatment, extent of the treatment, and the existence  
5 of an examination), specialization, and “other factors that tend to support or  
6 contradict a medical opinion or prior administrative medical finding” (including,  
7 but not limited to, “evidence showing a medical source has familiarity with the  
8 other evidence in the claim or an understanding of our disability program’s policies  
9 and evidentiary requirements”). 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-  
10 (5).

11 Supportability and consistency are the most important factors, and therefore  
12 the ALJ is required to explain how both factors were considered. 20 C.F.R. §§  
13 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in  
14 the regulations:

15 (1) *Supportability*. The more relevant the objective medical evidence  
16 and supporting explanations presented by a medical source are to  
17 support his or her medical opinion(s) or prior administrative  
18 medical finding(s), the more persuasive the medical opinions or  
19 prior administrative medical finding(s) will be.

18 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
19 administrative medical finding(s) is with the evidence from other  
20 medical sources and nonmedical sources in the claim, the more  
persuasive the medical opinion(s) or prior administrative medical  
finding(s) will be.

20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how the other factors were considered. 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). However, when two or more medical opinions or prior administrative findings “about the same issue are both equally well-supported ... and consistent with the record ... but are not exactly the same,” the ALJ is required to explain how “the other most persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3), 416.920c(b)(3).

The Ninth Circuit recently addressed the issue of whether the changes to the regulations displace the longstanding case law requiring an ALJ to provide specific and legitimate reasons to reject an examining provider’s opinion. *Woods v. Kijakazi*, No. 21-35458, 2022 WL 1195334, at \*3 (9th Cir. Apr. 22, 2022). The Court held that the new regulations eliminate any hierarchy of medical opinions, and the specific and legitimate standard no longer applies. *Id.* at \*3-4. The Court reasoned the “relationship factors” remain relevant under the new regulations, and thus the ALJ can still consider the length and purpose of the treatment relationship, the frequency of examinations, the kinds and extent of examinations that the medical source has performed or ordered from specialists, and whether the medical source has examined the claimant or merely reviewed the claimant's records. *Id.* at 6. However, the ALJ is not required to make specific findings regarding the

1 relationship factors. *Id.* Even under the new regulations, an ALJ must provide an  
2 explanation supported by substantial evidence when rejecting an examining or  
3 treating doctor's opinion as unsupported or inconsistent. *Id.*

4 Plaintiff argues the ALJ erred in his analysis of the opinions of Plaintiff's  
5 "medical and mental health providers," and the subsection heading addresses  
6 "treating providers." ECF No. 18 at 14. However, in the subsection, Plaintiff does  
7 not point to any specific providers or opinions except the opinion of Dr. Lorber,  
8 who is a non-examining medical expert who testified at the hearing and is not one  
9 of Plaintiff's providers. ECF No. 18 at 14-16. In other portions of the motion,  
10 Plaintiff states the ALJ rejected the opinions of Arthur Lorber, M.D., and Ronald  
11 Early, Ph.D., M.D. *Id.* at 8-9, 18. Dr. Early is also not a treating provider, as he  
12 performed a single examination in 2019. Tr. 1974-91.

13 *1. Dr. Early*

14 On July 11, 2019, Dr. Early performed a psychological examination for  
15 Plaintiff's workers compensation claim and rendered an opinion on Plaintiff's  
16 functioning. *Id.* Dr. Early diagnosed Plaintiff with PTSD, depressive disorder not  
17 otherwise specified, and anxiety disorder not otherwise specified. Tr. 1986. Dr.  
18 Early opined Plaintiff has no to mild limitations in most areas of functioning, but  
19 moderate and marked limitations in several areas of functioning. Tr. 1988-90. The  
20 ALJ found Dr. Early's opinion was not persuasive. Tr. 27.

1 Plaintiff discusses Dr. Early's opinion, and argues it is supported by the  
2 evidence, but does not specifically address the reasons the ALJ offered to reject Dr.  
3 Early's opinion. ECF No. 18 at 8-10. The ALJ found Dr. Early's opinion applied  
4 standards related to workers' compensation which were not relevant to this  
5 disability claim, and notes Plaintiff had improvement in his functioning over time.  
6 Tr. 27. Further, Plaintiff requested a closed period of disability due to his return to  
7 work in March 2019. Tr. 16. Plaintiff argues the ALJ should have incorporated  
8 the limitations set forth by Dr. Early into the RFC but does not address the fact that  
9 Plaintiff requested a closed period of disability that ended prior to Dr. Early's  
10 opinion date, and the opinion was rendered while Plaintiff was working 36 hours  
11 per week as a chef/line cook. Tr. 236, 350. Plaintiff sustained work from March  
12 2019 through March 2020, ECF No. 18 at 3-4, and Plaintiff does not set forth an  
13 argument as to how Dr. Early's disabling opinion is consistent with his ability to  
14 sustain work at a substantial gainful activity level for a year. As Plaintiff has not  
15 set forth an argument regarding the reasons the ALJ rejected Dr. Early's opinion,  
16 nor how the rejection is harmful error, Plaintiff has not met his burden in  
17 demonstrating the ALJ harmfully erred by rejecting Dr. Early's opinion.

18 *2. Dr. Lorber*

19 Dr. Lorber, a non-examining medical expert, rendered an opinion at  
20 Plaintiff's hearing. Tr. 44-50. Dr. Lorber opined Plaintiff equaled Listing 1.08

1 from May 28, 2014 through January 1, 2016, and medically improved January 2,  
2 2016. Tr. 48-49. The ALJ found the opinion that Plaintiff met a listing from May  
3 2014 to January 2016 was persuasive, and his opinion that Plaintiff's disability  
4 ended in January 2016 was supported by the evidence. Tr. 22-23.

5 Plaintiff argues the ALJ failed to incorporate the left upper extremity  
6 limitations opined by Dr. Lorber into the RFC, as the ALJ should have limited  
7 Plaintiff to "essentially no work with his left arm." ECF No. 18 at 18. However,  
8 Dr. Lorber opined Plaintiff can use his left arm to help with lifting and carrying,  
9 but it is very limited, and he can occasionally handle and do fine fingering. Tr. 49.  
10 While Dr. Lorber opined Plaintiff's left arm is "functionally useless," he opined  
11 Plaintiff was still capable of the light RFC with additional limitations that the ALJ  
12 adopted. Tr. 24, 49-50. Plaintiff has not demonstrated that the ALJ rejected any  
13 portion of Dr. Lorber's opinion.

14 While Plaintiff argues the ALJ erred in rejecting other medical opinions,  
15 Plaintiff does not specify any opinions that were improperly rejected and does not  
16 set forth an argument with any specificity regarding other opinions in the record.  
17 ECF No. 18 at 14-16. Because Plaintiff failed to develop this argument with any  
18 specificity, it is waived. *See Carmickle*, 533 F.3d at 1161 n.2 (determining Court  
19 may decline to address on the merits issues not argued with specificity); *Kim*, 154  
20 F.3d at 1000 (the Court may not consider on appeal issues not "specifically and



1 distinctly argued” in the party’s opening brief). Plaintiff is not entitled to remand  
2 on these grounds.

### 3 **D. Step Five**

4 Plaintiff argues the ALJ erred at step five by posing an incomplete  
5 hypothetical to the vocational expert and relying on expert testimony that was  
6 inconsistent with “the DOT and common knowledge.” ECF No. 18 at 16-20.

7 However, Plaintiff’s first argument is based entirely on the assumption that the  
8 ALJ erred in considering the medical opinion evidence and Plaintiff’s symptom  
9 claims. *Id.* For reasons discussed throughout this decision, the ALJ’s decision

10 discrediting Plaintiff’s symptom complaints and consideration of the medical  
11 opinion evidence are legally sufficient and supported by substantial evidence.

12 Thus, the ALJ did not err in finding Plaintiff capable of performing other work in  
13 the national economy based on the hypothetical containing Plaintiff’s RFC.

14 Next, Plaintiff argues the three representative jobs the vocational expert  
15 testified Plaintiff would be able to perform all exceed the RFC set forth by the  
16 ALJ. ECF No. 18 at 18-19. Plaintiff argues the jobs require more frequent use of  
17 his upper extremities than the RFC allows for, but Plaintiff concedes the DOT does  
18 not differentiate between bilateral and one-armed functions. *Id.* Plaintiff argues he  
19 cannot drive a car to perform the courier job, *id.* at 19, which is inconsistent with  
20 evidence discussed *supra* that demonstrates Plaintiff drives. Plaintiff also argues

1 he would perform the work too slowly to be tolerated in the workplace, but this  
2 argument again relies on his own symptom complaints and the medical opinion  
3 evidence, which the ALJ properly rejected. *Id.* at 18-19. Plaintiff is not entitled to  
4 remand on these grounds.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ's findings, the Court concludes the  
7 ALJ's decision is supported by substantial evidence and free of harmful legal error.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. The District Court Executive is directed to substitute Kilolo Kijakazi as  
10 Defendant and update the docket sheet.

11 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

12 3. Defendant's Motion for Summary Judgment, **ECF No. 19**, is  
13 **GRANTED**.

14 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

15 The District Court Executive is directed to file this Order, provide copies to  
16 counsel, and **CLOSE THE FILE**.

17 DATED May 3, 2022.

18 s/Mary K. Dimke  
19 MARY K. DIMKE  
20 UNITED STATES DISTRICT JUDGE